

APPEAL NO. 180298
FILED MARCH 21, 2018

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on August 16, 2017, with the record closing on December 18, 2017, in (city), Texas, with (administrative law judge) presiding as the administrative law judge (ALJ). The ALJ resolved the disputed issues by deciding that: (1) the compensable injury of (date of injury), extends to a left shoulder sprain/strain, a left hip sprain/strain, and a right knee sprain/strain; (2) the compensable injury of (date of injury), does not extend to an L1-2 disc bulge, an L3-4 disc bulge, an "L4-15" disc bulge, an L2-3 disc protrusion/herniation, L3-4 facet arthrosis, L4-5 facet arthrosis, L5-S1 facet arthrosis, L5 radiculopathy, C3-4 disc herniation/protrusion, C3-4 disc bulge, C5-6 disc bulge, C6-7 disc bulge, or cervical facet syndrome; (3) the appellant (claimant) had disability resulting from the compensable injury of (date of injury), from June 28, 2016, through the date of the CCH; (4) the claimant reached maximum medical improvement (MMI) on June 24, 2016; and (5) the impairment rating (IR) is five percent.

The claimant appealed, disputing the ALJ's determinations of MMI and IR. Additionally, the claimant disputes that portion of the extent-of-injury determination unfavorable to him. The respondent (carrier) responded, urging affirmance of the disputed extent of injury, MMI, and IR determinations.

The ALJ's determinations that the compensable injury of (date of injury), extends to a left shoulder sprain/strain, a left hip sprain/strain, and a right knee sprain/strain and that the claimant had disability from June 28, 2016, through the date of the CCH were not appealed and have become final pursuant to Section 410.169.

DECISION

Affirmed in part as reformed and reversed and remanded in part.

The parties stipulated, in part, that on (date of injury), the claimant sustained a compensable injury in the form of at least a cervical strain and a lumbar strain. The claimant testified that he was working on a roof when he slipped and fell on his back, landing on the roof.

The ALJ is the sole judge of the weight and credibility of the evidence (Section 410.165(a)) and, as the trier of fact, resolves the conflicts and inconsistencies in the evidence. *Texas Employers Insurance Association v. Campos*, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). As an appellate reviewing tribunal, the Appeals Panel will not disturb challenged factual findings of an ALJ absent legal error,

unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. *Cain v. Bain*, 709 S.W.2d 175, 176 (Tex. 1986); *In re King's Estate*, 150 Tex. 662, 244 S.W.2d 660 (1951).

EXTENT OF INJURY

According to the report from the benefit review conference and as noted by the ALJ on the record of the CCH, the extent-of-injury conditions in dispute at the CCH were as follows: L1-2, L3-4, and L4-5 disc bulge, L2-3 disc protrusion/herniation, L3-4, L4-5, and L5-S1 facet arthrosis, L5 radiculopathy, C3-4 disc herniation/protrusion, C4-5, C5-6, and C6-7 disc bulge, cervical facet syndrome, left shoulder sprain/strain, left hip sprain/strain, and right knee sprain/strain.

We note throughout the decision and order the ALJ mistakenly referenced the L4-5 disc bulge as the “L4-15” disc bulge. Accordingly, we reform all references of the L4-15 disc bulge to L4-5 disc bulge to conform to the issue before the ALJ and the evidence.

The ALJ’s determination that the compensable injury of (date of injury), does not extend to an L1-2 disc bulge, an L3-4 disc bulge, an L4-5 (as reformed) disc bulge, an L2-3 disc protrusion/herniation, L3-4 facet arthrosis, L4-5 facet arthrosis, L5-S1 facet arthrosis, L5 radiculopathy, C3-4 disc herniation/protrusion, C5-6 disc bulge, C6-7 disc bulge, or cervical facet syndrome is supported by sufficient evidence and is affirmed.

The ALJ determined that the compensable injury of (date of injury), does not extend to a C3-4 disc bulge. However, the C3-4 disc bulge was not before the ALJ to decide, nor was it litigated. Accordingly, we reverse the ALJ’s determination by striking the C3-4 disc bulge from the decision.

The ALJ failed to make a determination on the condition of a C4-5 disc bulge which was a condition before him to decide. Accordingly, we reverse the ALJ’s determination as being incomplete and we remand that portion of the extent-of-injury issue to the ALJ to decide whether the compensable injury of (date of injury), extends to a C4-5 disc bulge.

MMI/IR

Section 401.011(30)(A) defines MMI as “the earliest date after which, based on reasonable medical probability, further material recovery from or lasting improvement to an injury can no longer reasonably be anticipated.” Section 408.1225(c) provides that the report of the designated doctor has presumptive weight, and the Texas Department of Insurance, Division of Workers’ Compensation (Division) shall base its determination

of whether the employee has reached MMI on the report of the designated doctor unless the preponderance of the other medical evidence is to the contrary. Section 408.125(c) provides that the report of the designated doctor shall have presumptive weight, and the Division shall base the IR on that report unless the preponderance of the other medical evidence is to the contrary, and that, if the preponderance of the medical evidence contradicts the IR contained in the report of the designated doctor chosen by the Division, the Division shall adopt the IR of one of the other doctors. 28 TEX. ADMIN. CODE § 130.1(c)(3) (Rule 130.1(c)(3)) provides in pertinent part that the assignment of an IR shall be based on the injured employee's condition as of the MMI date considering the medical record and the certifying examination.

The ALJ determined that the claimant reached MMI on June 24, 2016, and that the claimant's IR is five percent. However, given that we have reversed the ALJ's extent-of-injury determination as being incomplete because he failed to determine whether the compensable injury of (date of injury), extends to a C4-5 disc bulge, we reverse the ALJ's determinations that the claimant reached MMI on June 24, 2016, and that the claimant's IR is five percent and remand the MMI and IR issues to the ALJ for further action consistent with this decision.

SUMMARY

We affirm that portion of the ALJ's determination that the compensable injury of (date of injury), does not extend to an L1-2 disc bulge, an L3-4 disc bulge, an L4-5 (as reformed) disc bulge, an L2-3 disc protrusion/herniation, L3-4 facet arthrosis, L4-5 facet arthrosis, L5-S1 facet arthrosis, L5 radiculopathy, C3-4 disc herniation/protrusion, C5-6 disc bulge, C6-7 disc bulge, or cervical facet syndrome.

We reform all references of the "L4-15" disc bulge to L4-5 disc bulge.

We reverse the ALJ's extent-of-injury determination by striking the C3-4 disc bulge from the decision.

We reverse the ALJ's extent-of-injury determination as being incomplete and remand that portion of the extent-of-injury issue to the ALJ to decide whether the compensable injury of (date of injury), extends to a C4-5 disc bulge.

We reverse the ALJ's determination that the claimant reached MMI on June 24, 2016, and remand the MMI issue to the ALJ.

We reverse the ALJ's determination that the claimant's IR is five percent and remand the IR issue to the ALJ.

REMAND INSTRUCTIONS

On remand the ALJ is to make a determination of whether the compensable injury of (date of injury), extends to a C4-5 disc bulge. After making a determination of whether the compensable injury of (date of injury), extends to a C4-5 disc bulge, the ALJ is then to make a determination of MMI and IR that considers the entire compensable injury.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the ALJ, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Division, pursuant to Section 410.202 which was amended June 17, 2001, to exclude Saturdays and Sundays and holidays listed in Section 662.003 of the Texas Government Code in the computation of the 15-day appeal and response periods. See Appeals Panel Decision 060721, decided June 12, 2006.

The true corporate name of the insurance carrier is **ZURICH AMERICAN INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**CORPORATION SERVICE COMPANY
211 EAST 7TH STREET, SUITE 620
AUSTIN, TEXAS 78701-3218.**

Margaret L. Turner
Appeals Judge

CONCUR:

K. Eugene Kraft
Appeals Judge

Carisa Space-Beam
Appeals Judge